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Gender Equality in Law: Uncovering the Legacies of Czech State Socialism

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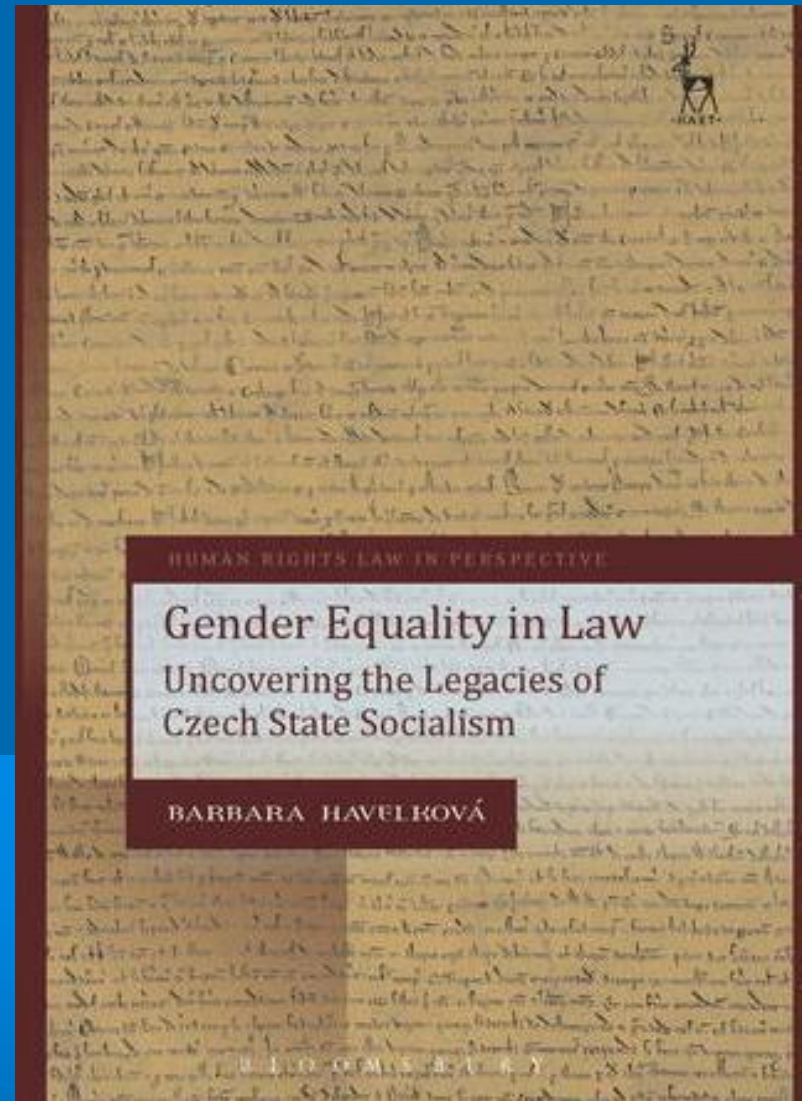
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Gender Equality in Law: Uncovering the Legacies of Czech State Socialism



Content

- The Triggers of the Project
- Methodology and Structure of the Book
- The Anti-Goldilocks Understanding of Discrimination – Too Narrow and Too Wide; Not Just Right



‘The Senate considers the ADA a tool for implementation of the requirements of EU law, the non-realization of which would lead to sanctions. It does not, however, identify with the character of the norm, which *artificially* interferes with the *natural* evolution of society, does *not* respect cultural differences among the Member states and elevates the demand of equality above the principle of *freedom of choice*. The Senate urges the government not to consent to adoption of further antidiscrimination measures at the EU level.’ (Senate declaration; 2008)

‘the current *anti-discrimination hysteria* [original emphasis]. The originally praiseworthy movement... has long surpassed the *borders of the reasonable*. It has started to ignore that our whole life is based on *our mutual difference* , and our life is beautiful and noteworthy because each of us is different. ... [A-D laws lead to] the limitation of the *freedom and free will* of individuals... [R]eal life reject regulations which are not *natural*.’ (Vojtěch Šimíček, Constitutional Court judge, 2015)

These statements have it all

- an essentialist, naturalizing understanding of differences between men and women
- a notion that equality is incompatible with freedom
- an assumption of cultural uniqueness of Czechia and of A-D law as a foreign import
- a perception that existing laws are objective and neutral, while any new gender-progressive regulation of social relations is an unacceptable interference with the natural social order
- unconscious taking of the male perspective and an unreflective entitlement to judge what's reasonable

Myths about the Past

- We had equality between men and women during state socialism and it didn't work
- State Socialism was feminist



Methodology & Structure

‘Feminist legal genealogy’

- Law in context
- Looks at historical development

Structure

- Part I – State Socialism
- **Part II – Post-Socialism**
- Three themes: gender, law and rights,
equality and anti-discrimination

The Anti-Goldilocks – (Mis)Understanding Anti- Discrimination Law in Czechia Today



Czech Courts and A-D Law

- Avoiding Anti-Discrimination Adjudication on Merits
- General Equality More Protected than Sex/Gender
- Refusal to See Sex/Gender as a Ground
- Indirect Discrimination—Blindness to Structural Biases

Avoiding Anti-Discrimination Adjudication

i. Concentrating on Formal Questions

Harassment - 'a breach of rights and obligations resulting from the right to equal treatment of men and women'? -> lack of remedy

ii. Shrinking the Scope of Reviewable Acts

Unequal treatment - decision about promotion or conditions of test

iii. Redirecting Applicants to Other Claims

Validity of termination vs discrimination

General Equality More Protected than Sex/Gender

- Constitutional Court – around 150 cases on equality, only a handful on protected ground (age, sex, race, disability)
- Ordinary courts – discrimination on the basis of ‘negative previous experience of the management with [the claimant]’
- Administrative bodies – ‘no ground’ discrimination pursued more (Trade vs Labour Inspectorate)

Refusal to See Sex/Gender as a Ground I.

i. Looking for Fault

A-D law (EU) - objective liability = no fault (intention, motivation) is required

- Courts require motive/intent; they see its lack as exonerating: 'it was not proven that the selection proceedings were instituted *deliberately with the intention to harm the claimant*' (KG)
- Courts expect an explicit expression of the ground of discrimination

Refusal to See Sex/Gender as a Ground II.

ii. Burden of Proof

The claimant only has to make a 'at first sight' case, then the defendant needs to explain themselves

- Courts are not sufficiently suspicious of irregularities in employers ' behaviour
 - Interview invitations 24 hours in advance (young mother)
 - Male successor earning twice of female predecessor
- Courts uncritically adopt gender stereotypical representations as submitted by employers
 - '[the plaintiff] carried out *operative* tasks whereas ... [her predecessor] executed *strategic* operations'

Indirect Discrimination— Blindness to Structural Biases

Indirect discrimination – ‘disparate impact’ of seemingly neutral rules

‘The fact that the child-carer — the claimant — reached such low level of income that he was subject to obligatory minimal tax *was not a systemic but rather a random matter*. Undoubtedly even parents who care for children over four years of age *can* reach higher incomes and therefore evade the minimum tax obligation.’

Anti-Goldilocks

- Too wide
 - General prohibition of arbitrariness and unfairness pursued more than discrimination on specific grounds
- Too narrow
 - The ‘few bad apples’ understanding
 - ‘Bad’ - only express, intentional, hateful acts are seen to be discriminatory and thus legitimate targets of a legal prohibition
 - ‘Few’ - discriminatory acts are typically seen as unconnected excesses that are rare and individualised

Wider importance

- A-D law is a good litmus test for whether and how a society is aware of inequality along particular axes (sex, race,...)
- The rejection of A-D law in Czechia is rooted in and shows the disbelief that there is inequality along the axis of sex
 - Denial of inequality
 - Denial of injustice (Naturalness&Choice)
 - Denials of responsibility (Deborah Rhode)